FELLOW-SERVANTS.

Appendicitis is such a common disease now-a-days, and we hear it so frequently discussed, that we naturally think the pathology of it has been well understood for years. It will surprise many, however, to know that the word does not appear in Webster's International Dictionary, nor in the Century Dictionary. It seems to me to be somewhat similar with the fellow-servant doctrine. We hear it so frequently and familiarly spoken of that we are apt to think that it really is common law—such an accurate writer as McKinney, in his work on Fellow-Servants, p. 215, referring to it as a "common law doctrine." The parallel has this difference, however: appendicitis has always afflicted the human race, but was known under different names, such as peritonitis, inflammation of the bowels, etc.; so far from the common law countenancing the fellow-servant doctrine, the doctrine of *respondeat superior* was crystalized into the maxim, *qui facit per alium, facit per se*, and was considered as firmly imbedded in the common law and as well recognized and as indisputable as the law of gravitation, or any axiom of geometry. The last generation were the first to hear of this doctrine, and the history of the rule goes back only to 1837, when Lord Abinger decided *Priestly v. Fowler* (1 Mees. & W. 1). The first case in America was decided in South Carolina in 1840 (*Murray v. So. Car. R. R. Co.*, 1st McMullan Law Reports, 385). In 1842 the question came up for decision in Massachusetts (*Farwell v. Boston & W. R. Co.*, 4 Metc. 49). *Priestly v. Fowler, supra*, was decided by Lord Abinger without any reference to the earlier doctrine, but it constitutes a clear exception from which has flowed a copious flood of all the modern law as to fellow-servants and a common employment. It is not extravagant to say that this decision in its influence upon subsequent jurisprudence is second to no adjudication to be found in the reports. No other reported case has changed the current of decision more radically than this one. All the subsequent common law report books contain refinements upon this doctrine, here for the first time announced, that the superior may not under given conditions be held responsible for the torts or negligent acts of his agent. (McKinney on Fellow-Servants, p. 5; Beach on Contributory Negligence, p. 98.) The reasons given for the rule are:

1st. That it is common law; and that the servant is supposed in law to know, when he obtains employment, that he takes the risk of

injury by a fellow-servant upon himself, and his compensation is arranged accordingly. The case of *Priestly v. Fowler, supra,* was cited as a controlling one before Lord Cockburn, in a Scottish case (*Dixon v. Rankin,* 1 Am. Ry. Cas. 569), in 1852, and he said in his opinion:

"The plea that the master is not liable rests solely on the authority of two or three recent decisions of English courts. If this be the law of England, I speak of it with all due respect, but it most certainly is not the law of Scotland. I defy any industry, or dictum, or institutional indication, or any trace of any authority to this effect, or of the tendency, from the whole range of our law. If such an idea exist in our system it has as yet lurked undetected. It has never been directly condemned, because it has never been stated."

It was pressed in the argument that the rule was right, because of its inherent justice, and he said:

"This last recommendation fails with me, because I think the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable to legal reason. I can conceive some reason for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that they are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and certainly are not understood by our law to come under any engagement to take these risks on themselves."

This case was overruled by the House of Lords (*McFarland v. Caladonian R. Co.,* 6 Macq. 102), not on the ground that the doctrine existed at common law, but because the Scotch law had to be assimilated with the law of England.

In 1853, in commenting on *Dixon v. Rankin, supra,* Lord Brougham said that it was also unknown to the common law of England.

In the case of *Louisville & Nashville Railroad Co. v. Collins,* 2 Duval, the Court of Appeals of Kentucky said that the doctrine was not adopted to its full extent in that State, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason.

2d. Another reason given for the maintenance of the rule is that it operates as a stimulant to diligence and caution on the part of the employee for his own safety, as well as that of his employer.

Justice Field, in delivering the opinion of a majority of the Supreme Court of the United States in the case of *C. & M. Railroad Co. v. Ross,* 112 U. S., 383, thus answers this argument:

"Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protec-

tion against accident. But it may be doubted whether the exemption has the effect claimed for it. We have never known parties more willing to subject themselves to danger of life or limb, because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant."

This case was overruled by a divided court in *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, but the reasoning of Mr. Justice Field in the above quotation was not refuted.

The doctrine works such hardships that the courts of many of the States have modified it by various limitations, such as holding the employer responsible when the workman is injured by another workman in a different department; again, by the vice-principal limitation—that is, where the workman causing the injury occupies for the time the position of employer; and upon this there is the variation that every superior servant is a vice-principal as to those beneath him. In Virginia the decisions have been far from uniform, and while our present court holds that the employer must provide suitable and safe machinery and exercise reasonable care in employing proper workmen, it has laid down the proposition that a person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow-servant.

The "different department" limitation prevails in Illinois, Kentucky, Tennessee and Georgia and was adopted in Virginia in the cases of *Moore's Adm'r v. R. & D. R. R. Co.*, 78 Va. 745; *B. & O. Railroad Co. v. McKensie*, 81 Va. 71; *Torian's Adm'r v. R. & A. R. R. Co.*, 84 Va. 192; and in *R. & D. R. R. Co. v. Norment*, 84 Va. 167; but these cases were apparently ignored in *N. & W. R. R. Co. v. Donnelly*, 88 Va. 853, and *N. & W. R. R. Co. v. Lindamood's Adm'r*, 14 So. East Rep. 694, where entirely different views are taken. These latter cases are followed in *N. & W. R. R. Co. v. Nuckols' Adm'r*, 1 Va. Law Register 579; s. c. 21 S. E. Rep. 342, with the qualification that if the departments are so far separated from each other as to exclude the probability of contact and of danger from the negligent performance of their duties by employees of the different departments, then the servant is not deemed to have contracted with reference to the negligent performance of the duties of his fellow-servant in such other department.

The superior servant limitation is generally favored by the text-writers and the Southern and Western Courts, *i. e.*, Alabama, Ken-

tucky, Tennessee, North Carolina, West Virginia, Ohio, Nebraska, Missouri, Georgia, Rhode Island, Illinois and Washington, and by Thompson, Shearman & Redfield, Wharton, and Beach. It, however, is repudiated by the United States Supreme Court (*B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, overruling *C. & M. R. R. Co. v. Ross*, 112 U. S. 383. See also *Hambly's case*, 154 U. S. 349), New York, Maine, Indiana, Michigan, Minnesota, California, Texas, Pennsylvania, Massachusetts, South Carolina, Iowa, Maryland and Connecticut. (McKinney on Fellow-Servants, p.112.) In Virginia the cases of *Ayers' Adm'x v. R. & D. R. R. Co.*, 84 Va. 679; *Johnson's Adm'r v. R. & A. Railroad Co.*, 84 Va.713; *R. & D. Railroad Co. v. Williams*, 86 Va. 165; *R. & D. R. R. Co. v. Rudd*, 88 Va. 648, strongly leaned towards this limitation and of treating all superior servants as vice-principals, but these cases have not been followed in *N. & W. R. R. Co. v. Nuckols, supra*, which lays down the rule "that the liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal." See also *Shugart's Adm'x v. N. & W. R. R. Co.*, 22 S. E. Rep. 484; *N. & W. R. R. Co. v. Brown*, 22 S. E. Rep. 496.

N. & W. R. R. Co. v. Nuckols, supra, practically does away with the limitations save those of "vice-principal" and the refinement of "the different department" as shown above, and holds the employee down to the cast-iron rule that "a person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow-servant." This case, being the first one involving the doctrine to come before the present court, was evidently maturely considered. It is a very strong and clear opinion, but bears severely on the employee.

The doctrine under discussion has been found to press with such harshness on employees that many legislative bodies both in America and Europe have asserted *their* constitutional right to make laws and have legislated this judge-made law out of existence. After much public agitation the British Parliament, although composed so largely of the wealthy classes, felt the pressure of public opinion so sharply that they were driven to enact, in 1880, the employers' liability act, which allowed the employees of all common carriers and manufacturing establishments to receive compensation for injuries caused by fellow-servants. The Prussian law until 1881 recognized the non-liability of the employer, when as Professor Brun says: "These rules are not sufficient to meet the exigencies of modern life, especially in the case of

such great industrial undertakings as railways, shipping, carriers, factories, mines, &c. If in accordance with the rules of Roman Law, the liability of the employer is limited to his negligence in selection and supervision, whilst otherwise the employee in fault is alone liable, and in cases of accident there is no liability at all, the profit gained and the risk incurred by the employer would be out of all proportion to each other, and almost the whole risk would be transferred to the public and to the workman." For this reason the German Commercial Code has, in the case of carriage by land and by water, and especially in the case of railways, introduced a general liability on the carrier, from which *vis major* is the only exception, and has gone so far as to prohibit contracts in derogation of this liability. Further provision for the liability to pay compensation in the case of death or personal injuries, occurring in connection with railways, mines, quarries, pits and factories is made by an imperial law of June 7, 1871. In France the question arose whether an employee could recover damages for the carelessness of his fellow-servant, and was decided in the affirmative in 1841. The same rule holds in Italy. (McKinney on Fellow-Servants, pp. 17 and 18.)

Many of the States have enacted laws abolishing the doctrine. Alabama and Massachusetts have such statutes applicable to employees of manufacturing establishments and common carriers; Rhode Island, statutes for common carriers; California, Georgia, Iowa, Kansas, Kentucky, Mississippi, Minnesota, Montana and Wyoming have statutes applicable to railroads only. The Iowa and Kansas statutes were attacked as being unconstitutional, but the Supreme Court in *Mo. Pacific Railway Co. v. Mackey*, 127 U. S. 205, and in *Minneapolis &c. Rwy. Co. v. Herrick*, Id. 210, unanimously held them constitutional and said:

"The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar danger to their employees, and no objection, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to canal and stage-coaches and to persons and corporations using steam in manufactories."

A crusade against corporations, as such, is most unwise, as all must realize that our advancement as a people is dependent on them—not on monopolies or the abuses of corporate powers—but on corporate

enterprises. Nevertheless, the corporations ought to be held to a just responsibility, and the bill now pending before the General Assembly deals with railways alone, because there the greatest evil prevails.

Is there any necessity for legislation?

The reports of the Railroad Commissioner of Virginia for the years 1890-'95 show that in Virginia in this period of six years 6,480 employees of railroad were injured, 517 dying from their injuries. Virginia has one-fortieth of the population of the United States, and one-fiftieth of the railroad mileage. Presuming that the roads in other States are as well managed as those of Virginia, and taking the population as a basis of calculation, there would be in the United States 43,200 railroad employees injured every year, of which there would be 3,400 killed; taking the mileage as a basis, 54,000 are injured every year, 4,300 fatally. Seven hundred and eighty thousand persons were employed by railways in 1894. On the mileage basis it would indicate that seven per cent. of the whole number employed were injured every year, or that in the course of fifteen years every one would be injured. (It should be stated, however, that the report of the Interstate Commerce Commission for 1894 shows that only 25,245 railroad employees were injured and killed in that year in the United States. Therefore, it appears there is a disproportionate number of accidents in Virginia—indeed quite 100 per cent. greater than her proportion of population or mileage in the United States would justify.) What fearful statistics, especially when it is remembered that the accidents all happen to able-bodied men—possibly a large majority being married! So great is the evil that President Harrison made it the subject of a message, and Congress responded by passing a law that all railroads should have automatic couplers by January 1, 1898. One of the planks in the National Democratic platform of 1892 was devoted to the subject and redress demanded.

The pending bill cannot be considered drastic or destructive to railroad enterprises, when it is considered that ten States and two Territories have abolished the doctrine and it does not prevail in the United Kingdom of Great Britain and Ireland, France, Germany or Italy. The doctrine was abolished in Wisconsin in 1875, but the law was repealed in 1880, as McKinney says, "owing to the pressure brought to bear by the railways," and is the only State that after abolishing the doctrine ever returned to it.

Governor McKinney in his message of December 2, 1891, to the Legislature of Virginia, said:

"The law regulating the liability of master and servant is the subject of many controversies. The decisions are so numerous and conflicting that there should be some legislation defining their respective rights. The decisions in this country cannot be reconciled. The reasoning, which was at the foundation of the earliest decisions in the English Courts, is not applicable to our country and people, and while it has been adopted in many of the States it has been disregarded in others, and in some repudiated by statute. It has been modified even in England. Injuries to employees, by the various railroads and manufacturing companies, have become alarming, and cry aloud to the Legislature for protection and redress. Where an employee is injured by a co-employee who is about the master's business, he is the agent of the master, selected by him, and the master should be responsible for injuries caused by his wrongful acts, neglect or default, done in the line of his employment, inasmuch as the master receives the benefit of his labor."

Governor E. W. Wilson, in a vigorous message to the Legislature of West Virginia, on January 15, 1890, said:

. . . . "This recommendation is intended to protect railway employees and those dependent upon them against a rule of law to be found in modern text-books, said to be the result of a preponderance of judicial determinations. This rule is this: 'All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risks of each other's negligence.'

"This so-called rule of law has grown up within the memory of many men still living. It is not over fifty years old, not as old, by a number of years, as our first railroad. The rules relating to Principal and Agent and Master and Servant are hoary with centuries of age, yet such a monstrosity had never appeared to the minds of the common law writers; its birth was reserved for a later day, and later methods, and later influences. As railroads have grown the rule has grown; and it is perfectly safe to conclude, that had there been no railroad there would have been no such rule. . . . .

"And so, the injured man must be turned away remediless and, possibly, with his family, be compelled to rely upon public or private charity. . . . . .

"Railroads are a necessity of the age. They are indispensable for travel and traffic. They are built by capital for profit. The train employee is in constant peril of life and limb. . . . . The employee is paid for his labor alone—poorly at that—and nothing for his risks. Capital gets all the profits, and it should take all the risks. The faithful labor and courage which it employs in the most dangerous of all industrial pursuits, should not go unrewarded when overtaken by misfortune and disaster through the negligence of others of the principal's agents."

The judges in their decisions may impute to the servant as a *matter of law* that he takes his position with a full knowledge of the risks he is assuming and of the rule of law which prevents him from recovering damages when injured by a fellow-servant; but observation and inquiry among the employees would seem to indicate that as a *matter*

of fact they know nothing about any such rule. Of course railroads are run by their officials to make money, and the fewer accidents they have the better for all concerned. It certainly seems unreasonable to suppose that an employee would be wilfully careless and run the risk of killing a co-employee *because* the latter might recover damages. Every sane man knows if he recklessly and negligently hurt himself, he can recover no damages.

Therefore, would not the abolition of the doctrine have the effect of diminishing the perils of railroading by further increasing the vigilance of its officials and their desire to obtain the latest improvements, and at the same time do the employees a plain act of justice, and be following the example of many of our most progressive States and of the great kingdoms of Europe?

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